

frauds, because, in her answer, in which reliance is placed upon the statute, it is levelled, not at the agreement which the bill seeks to enforce, but at the authority of the agent, Turnbull, to make that agreement; and as the cases show that the authority of the agent need not be in writing, the statute has no application to the case.

It is not, however, I think, altogether clear, that in a case like the present, the defendant was bound to insist upon the statute of frauds at all. The answer certainly denies the authority of Turnbull, to make any agreement for the defendant, and, therefore, denies that any agreement binding upon her was made; and under such circumstances, it is by no means certain, that she is not entitled to the benefit of the statute of frauds, without pleading it. In the case of the *Ontario Bank vs. Root*, 3 Paige, 478, it was decided, that where the complainant sets up an agreement in his bill, which would be invalid by the statute of frauds, unless in writing, and the defendant by his answer denies the agreement, it is not necessary for him to insist upon the statute as a bar, but the complainant at the hearing must establish the agreement by written evidence.

If, however, the defendant in his answer admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground, that the defendant has thereby renounced the benefit of the statute. *Story's Equity Pl.*, sec. 763; *Blayden vs. Bradbear*, 12 Ves., 471; *Cozine vs. Graham*, 2 Paige, 177; *Jones vs. Sluby*, 5 H. & J., 372.

In this case the defendant certainly has not admitted the agreement set up in the bill; and, as that agreement, being by parol, and affecting lands, is invalid by the statute of frauds, it is not so clear, that the defendant may not claim the benefit of the statute at the hearing, even though she has not insisted upon it as a bar.

But I am inclined to think, that the statute is relied upon in the answer in this case.

Perhaps, giving a strictly grammatical construction to that